Supreme Court, U.S.
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No. 94 850

IN THE
Supreme Court of the United States
October Term, 1994

FRAN T. BROWN,

Petitioner,

v.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION AND JACOBS AND GOODMAN, P.A.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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November, 1994

QUESTION PRESENTED

The Florida Unemployment Appeals Commission has determined that an employee forced from her job by sexual battery and harassment in the workplace is disqualified from receiving unemployment compensation benefits if she cannot show that she gave notice of the harassment to her employer and then kept working long enough to further show either that the employer did not take adequate measures to prevent reoccurrence or that the harassment continued. The Fifth District Court of Appeal of Florida, en banc (five to three), affirmed the decision of the Florida Unemployment Appeals Commission, and held that, although the harassment occurred, the claimant did not show that her departure from employment was with good cause attributable to her employing unit. The Supreme Court of Florida (four to three) denied Brown's petition for review.

These decisions violate the Supremacy Clause of the United States Constitution because they frustrate and impede the enforcement of Title VII of the Civil Rights Act of 1964 and the mandate of Congress that persons unemployed through no fault of their own should be entitled to receive unemployment compensation benefits. Further, these decisions conflict with and undermine applicable decisions of this Court proscribing sexual harassment in the workplace.

The important question presented by this case is:

1. Whether a state may refuse to pay unemployment insurance benefits to employees forced to leave their jobs because of sexual battery and harassment in the workplace?

RULE 29.1 DISCLOSURE

The caption of the case in this Court contains the names of all parties before the Florida Unemployment Appeals Commission and the District Court of Appeal of Florida, Fifth District. No party has any parent companies, subsidiaries or affiliates. This representation is made pursuant to Rule 29.1 of this Court.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

Fran T. Brown ("Brown") petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Fifth District, in *Brown v. Unemployment Appeals Commission and Jacobs and Goodman, P.A.*, 633 So. 2d 36 (Fla. Dist. Ct. App. 1994) (en banc), which affirmed, by a five to three majority, the decisions of an unemployment appeals referee and the Florida Unemployment Appeals Commission that an employee forced from her job by workplace sexual battery and harassment is not entitled to receive unemployment compensation benefits unless she can show that she gave notice of the harassment to the employer and then kept working long enough to further show either that the employer did not take appropriate steps to prevent reoccurrence or that the harassment continued.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Fifth District is reported at 633 So. 2d 36 (Fla. Dist. Ct. App. 1994) (en banc) (1a).[1] The decisions of the Unemployment Appeals Referee (19a), Unemployment Appeals Commission (24a), and the Supreme Court of Florida (declining to accept jurisdiction) (26a) are in the Appendix.

STATEMENT OF JURISDICTION

This is a petition for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Fifth District rendered on February 4, 1994, (petition for review to the Supreme Court of Florida denied August 16, 1994). Jurisdiction lies pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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[1]The reference to ("___"a) is to the Appendix to this petition. The portions of Brown's brief to the Supreme Court of Florida raising the relevant federal issues are also included in the appendix (27a).

Title VII of the Civil Rights Act of 1964

It shall be an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . . sex. . .

42 U.S.C. § 2000e - 2(a)(1).

Section 503(a)(1) of the Social Security Act

(a) The Secretary of Labor shall make no certification for payment to any state unless he finds that the law of such state, approved by the Secretary of Labor under the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.], includes provisions for

> (1) Such methods of administration. . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . .

42 U.S.C. § 503(a)(1)

Fla. Stat. § 443.101 (1993)

443.101 Disqualification for benefits - An individual shall be disqualified for benefits:

> (1)(a) For the week in which he has voluntarily left his work without good cause attributable to his employing unit. . .

STATEMENT OF THE CASE

Brown was employed as a legal assistant at the Jacobs and Goodman law firm. She was subjected to egregious sexual battery and harassment at her workplace for a period of approximately five months. At first, the harassment consisted of incessant verbal sexual advances. Later, the harasser exposed himself to Brown on four or five occasions. On other occasions, the harasser lifted up Brown's blouse and touched her offensively.

Brown's harasser was a senior non-attorney who worked for one of the named partners of the Jacobs and Goodman law firm. The harasser's wife was the law firm Administrator with full authority over the law firm's clerical personnel, including Brown. When the principals of the law firm became aware of Brown's harassment, the harasser was left in place. To remain in the work environment, Brown would have had to interface with he and his wife on a daily basis.

Brown's psychologist advised her that she would not be able to recover from the trauma sustained if she worked in an environment where she would come into daily contact with both the harasser and his wife. Brown did not return to work under these circumstances, but instead sought unemployment compensation benefits while she searched for employment elsewhere.[2]

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[2] Brown was the only witness to testify in the hearing before the unemployment appeals referee. Thus, the issue before the Fifth District Court of Appeal was the correct application of the law to the undisputed facts presented. Nevertheless, the majority of the Fifth District Court of Appeal affirmed the Unemployment Appeals Commission on the basis that the Court lacked authority to interfere with an administrative decision based on an acceptable view of the evidence below.

An unemployment appeals referee and then the Florida Unemployment Appeals Commission decided that Brown was disqualified from receiving unemployment compensation benefits because she did not give notice to her employer of the harasser's actions and then continue working long enough to show either that the employer did not take adequate steps to prevent reoccurrence or that the harassment persisted.

The Fifth District Court of Appeal of Florida, en banc (five to three), held that, absent this showing, Brown did not meet her burden to prove good cause attributable to her employing unit for not returning to work. Therefore, the majority ruled that Brown was disqualified to receive unemployment compensation benefits.

The Supreme Court of Florida (four to three) denied Brown's petition for further review.

REASON FOR GRANTING THE WRIT

The Decisions of the Florida Unemployment Appeals Commission and Fifth District Court of Appeal of Florida Violate the Supremacy Clause of the United States Constitution Because They Frustrate and Impede the Enforcement of Title VII of the Civil Rights Act of 1964 and Section 503(a)(1) of the Social Security Act. Further, These Decisions Conflict with And Undermine Applicable Decisions of this Court Outlawing Sexual Harassment in the Workplace.

The decisions of the Florida Unemployment Appeals Commission and Fifth District Court of Appeal in *Brown v. Unemployment Appeals Commission and Jacobs and Goodman, P.A.*, 633 So. 2d 36 (Fla. Dist. Ct. App. 1994) (en banc) violate the Supremacy Clause of the Constitution because they thwart and hinder the enforcement of Title VII

of the Civil Rights Act of 1964 and Section 503(a)(1) of the Social Security Act. *Howlett v. Rose,* 496 U.S. 356, 367 (1990) (The Supremacy Clause of the United States Constitution establishes that federal statutes are "the Supreme Law of the Land," and charges state agencies and courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. The federal law is the law in the state as much as laws passed by the state legislature. Further, the policy of a federal statute is to be considered "the prevailing policy in every state" which the state court can not refuse to enforce.); *McCulloch v. Maryland,* 17 U.S. 316 (1819) (States cannot retard, impede, burden or in any way control the operation of valid laws enacted by Congress); *Felder v. Casey,* 487 U.S. 131 (1988) (Wisconsin statute requiring notice of claim prior to state court suit under 42 U.S.C. § 1983 against local governmental entity or officer frustrated, interfered with and was inconsistent with federal law. Therefore, the notice provision was invalid. The notice was held to be inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.). In addition, these decisions conflict with and undermine this Court's decisions in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). Therefore, the Court should grant this petition.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e - 2(a)(1); *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.,* 114 S. Ct. 367 (1993). "The phrase 'terms, conditions, or privileges of employment' has been construed broadly as an expression of congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor,* 477 U.S. at 64 (quoting

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)); *Harris,* 114 S. Ct. at 370.

In interpreting Title VII, this Court has stated unequivocally that sexual harassment in the workplace is unlawful and contrary to public policy. *Meritor* rejected the notion that Title VII was limited to "economic" or "tangible" discrimination, *Meritor,* 477 U.S. at 64, quoting the Eleventh Circuit Court of Appeals:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor, 477 U.S. at 67 (quoting *Henson v. Dundee,* 682 F.2d 897, 902 (11th Cir. 1982)).

Brown should have been permitted to leave the Jacobs and Goodman law firm because of the harassment and receive unemployment compensation while she sought other employment. An employer is properly charged with maintaining a workplace free from sexual harassment. Brown should not have been required to give notice of the harassment to her employer and then wait to see if the employer would take appropriate measures to prevent reoccurrence or that the harassment continued. The decision to deny unemployment compensation benefits to Brown seriously undermines the strong public policy of the federal government in favor of eliminating workplace sexual harassment and protecting unemployment compensation

claimants who are forced from their jobs through no fault of their own.

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) is closely analogous to this case. In *Nash*, the Florida Industrial Commission ruled that an unemployed person was not entitled to continue receiving unemployment compensation after filing an unfair labor practice charge against her former employer. This Court reversed holding that the application of the Florida Unemployment Compensation Law violated the Supremacy Clause of the Federal Constitution, since the imposition of such a financial burden on the former employee frustrated enforcement of the National Labor Relations Act, which required that unfair labor practice proceedings be instituted by individuals, and which prohibited coercive actions against persons making charges.

Furthermore, the objective of Congress in establishing the unemployment compensation insurance program, as part of the Social Security Act, was to provide a substitute for wages lost during a period of unemployment which is not the fault of the employee. *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971) (The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed to tide themselves over until they find other employment, without having to turn to welfare or private charity. The benefits also assist a worker to devote his or her efforts to looking for a job and finding substantially equivalent employment.).[3] Florida's unemployment compensation statute, which is part of a nationwide

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[3]The Florida legislature has expressly declared that "economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state." Further, that unemployment is "the greatest hazard of our economic life" requiring protection to lighten the burden which "so often falls with crushing force upon the unemployed worker and his family." Fla. Stat. § 443.021 (1993).

employment security system, is to be liberally construed in favor of claimants, like Brown, to achieve its declared remedial purpose of providing relief to persons who are unemployed through no fault of their own. *Gulf County School Board v. Washington*, 567 So. 2d 420 (Fla. 1990); Fla. Stat. §§ 443.021, 443.031 (1993). The State of Florida's denial of unemployment compensation benefits to a person involuntarily forced from her job by blatant sexual harassment violates the requirement of the Social Security Act that benefits must be fully paid when due. 42 U.S.C. § 503(a)(1).

The "good cause attributable to the employing unit" standard, as erroneously applied in this case, unfairly burdens the enforcement of Title VII of the Civil Rights Act. *See Hill v. Florida,* 325 U.S. 538 (1945) (Florida labor regulation struck down under the Supremacy Clause); *Perez v. Campbell,* 402 U.S. 637 (1971); *Hines v. Davidowitz,* 312 U.S. 52 (1941).[4] State agencies and courts should be obligated to construe this standard in harmony with the law proscribing sexual discrimination and harassment so as not to eviscerate the essential, fundamental protections of Title VII of the Civil Rights Act and the Social Security Act. Victims of workplace sexual harassment should not be subjected to the penalty of being disqualified from receiving unemployment compensation benefits when they are forced to leave their jobs by intolerable and dangerous conditions. This Court should establish a clear and uniform rule for reconciling the "good cause attributable to the employing unit" standard with the mandates of Congress in Title VII of the Civil Rights Act and the Social Security Act, and with the decisions of this Court.

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[4]The distinction between voluntary and involuntary unemployment has been recognized to be of significant importance in unemployment compensation law. *Baker v. General Motors Corp.*, 478 U.S. 621 (1986) (This distinction has been characterized as the key to eligibility.).

Sexual harassment in the workplace is a serious threat to the dignity and security of many employees, particularly those who cannot afford to leave a job and be without income, even when confronted with a perilous and insufferable work environment. The citizens of this country deserve a workplace free from intimidation, fear and physical danger. When an employee has been subjected to odious and unlawful acts of sexual harassment committed in their workplace, the employee should at least be permitted to leave that job without losing the safety net created to mitigate the financial hardship of unemployment.

The clear and compelling public policy in favor of abolishing workplace sexual harassment and sustaining unemployment compensation claimants is severely weakened by the decisions of Florida's Unemployment Appeals Commission and Fifth District Court of Appeal. Review of these decisions is essential to maintain the integrity and force of this Court's decisions, and the mandates of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 9th day of November, 1994.

Respectfully Submitted,

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APPENDIX

FRAN T. BROWN, Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION AND JACOBS AND GOODMAN, P.A., Appellees.

No. 93-637.

District Court of Appeal of Florida,
Fifth District.

February 4, 1994.

Rehearing Denied March 14, 1994.

Claimant sought review of decision of Unemployment Appeals Commission, denying her claim for unemployment benefits. The District Court of Appeal, Cobb, J., held that claimant failed to establish "good cause" for voluntarily leaving her employment after employer had corrected alleged sexual harassment situation and, thus, claimant was ineligible for unemployment compensation.

Affirmed.

Dauksch, J., dissented with opinion with which Griffin and Diamantis, JJ., concurred.

Griffin, J., dissented separately with opinion.

1. Social Security and Public Welfare (402)

Statute denying eligibility for unemployment compensation to employee who voluntarily leaves her employment without good cause attributable to employer only protects workers of employers who wrongfully cause their employees to leave their employment. West's F.S.A. § 443.101(1)(a).

2. Social Security and Public Welfare (565)

Burden is on claimant for unemployment compensation to show that voluntary departure from employment was attributable to wrongful conduct of employer.

3. Social Security and Public Welfare (402)

"Good cause" to voluntarily leave employment for unemployment compensation purposes focuses on whether circumstances would have impelled average, able-minded, and qualified worker to give up her employment, rather than focusing on reaction of highly emotional, super sensitive employee. West's F.S.A. § 443.101(1)(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Social Security and Public Welfare (415)

Claimant failed to establish "good cause" for voluntarily leaving her employment by refusing to return after employer had corrected sexual harassment situation which allegedly had caused her departure and, thus, claimant was ineligible for unemployment compensation; claimant refused to participate in investigations of harassment and was transferred to another building away from harasser, but refused to return due to

presence of harasser's wife in new building. West's F.S.A. § 443.101(1)(a).

Thomas P. Moran and Kelly T. Blystone, Subin, Shams, Rosenbluth, Moran, Losey & Brennan, P.A., Orlando, for appellant.

Robert W. Thielhelm, Jr., Baker & Hostetler, Orlando, for appellee Jacobs & Goodman, P.A.

No appearance for appellee Unemployment Appeals Com'n.

EN BANC

COBB, Judge.

The appellant, Fran Brown, appeals the affirmation by the Unemployment Appeals Commission of the decision of the appeals referee denying her claim for unemployment benefits. Brown was a legal assistant at an Orlando law firm, where she was sexually harassed by a male coworker over a period of some five months. She did not report this to her employers.[1] When they learned of it through another employee, they met with Brown and then placed her on paid administrative leave. Several days thereafter, they advised Brown they wanted her to return to work and would change her work location to the firm's main building. The administrator of the law firm, the harasser's wife, worked in the main building. Brown refused to return to work based upon the presence of the harasser's wife and upon the advice of her attorney and her psychologist. Brown said she would

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[1]Indeed, she remained actively on the job for more than 30 days after the culminating incident referred to in Judge Daulsch's dissent without any complaint to her employers.

have refused to return to work even if the harasser was not permitted to be near her. She also felt she could not work around the harasser's wife, even though the latter was without fault. Brown was asked to cooperate in the investigation conducted by the employer, and refused to do so – again, on advice of counsel. She quit her job after her leave of absence expired.

Based on the foregoing facts, the referee arrived at the following "Conclusions of Law":

> CONCLUSIONS OF LAW: The unemployment compensation law provides that a claimant who has voluntarily left work without good cause or has been discharged by the employing unit for misconduct connected with the work shall be disqualified from receiving benefits.
> The record and evidence in this case show that the claimant quit her job when she refused to return to work after her leave of absence was over.
> The law further provides that a claimant who has voluntarily left work without good cause as defined in the statute shall be disqualified from receiving benefits.
> "Good cause" includes only such cause as is attributable to the employing unit or which consists of an illness or disability of the claimant requiring separation from the work.
> The record and evidence in this case show that the claimant voluntarily quit her job when she refused to return to work after a leave of absence.
> When an individual leaves work voluntarily, as the claimant did, she carries the burden to show that her leaving was with good cause attributable to the employer, in order to qualify for unemployment compensation benefits. That burden has not been met in this case.

There was no evidence that the employer had any idea that the claimant was a victim of unwelcome sexual advances until the end of January 1992. The claimant told several family members, two girlfriends, and two co-workers. The claimant never told anyone in authority that she was being sexually harassed. It appears obvious that the only way that the employer knew of the situation was because the claimant told a co-worker, who apparently told the claimant's supervisor. The claimant acknowledged the situation when confronted. The employer immediately placed the claimant on a paid leave of absence for several days, in order for them to investigate the claimant's allegations. The employer asked the claimant to cooperate with the investigations, one of which was an outside investigation. The claimant refused to cooperate in any investigation conducted by the employer. The employer moved the claimant's work location to another building, but the claimant found this to be unacceptable because the harasser's wife worked there. The claimant stated at the hearing that even if the harasser would have no access to her, she still could not return to the work place because the harasser's wife worked there. The claimant further testified that the harasser's wife had no knowledge of the events, and had not caused the claimant any harm. The claimant determined that the employer's offer to remedy the situation was inadequate, and she refused to work in the new location.

The employer was entitled to a reasonable amount of time to investigate the situation, and determine if the claimant's allegations were true. The claimant speculated that the employer's remedy would not work. The claimant failed to act as a reasonable person in attempting to preserve the employer/employee relationship. Therefore, it can only be concluded that the claimant voluntarily quit her job without good

cause attributable to the employer, and she is disqualified from the receipt of benefits.

[1,2] The law is clear that an employee who voluntarily leaves her employment without good cause attributable to her employer is not eligible to receive unemployment compensation benefits. *See* §443.101(1)(a), Fla. Stat. (1991). This subsection only protects workers of employers who wrongfully cause their employees to "voluntarily" leave their employment. *Moore v. Florida Unemployment Appeals Comm'n,* 498 So.2d 992 (Fla. 1st DCA 1986); *Home Fuel Oil Co., Inc. v. Florida Unemployment Appeals Comm'n,* 494 So.2d 268 (Fla. 2d DCA 1986). The burden below was on the claimant, Brown, to show that her voluntary departure from employment was attributable to the wrongful conduct of her employer, Jacobs and Goodman, P.A. *See Marcelo v. Dep't of Labor and Employment Sec.,* 453 So.2d 927 (Fla. 2d DCA 1984). Clearly, as determined by the appeals referee and Unemployment Appeals Commission, she failed to meet that burden.

[3,4] The "good cause" for voluntarily leaving employment focuses on whether the circumstances would have impelled the average, able-minded, qualified worker to give up her employment. *Dean v. Florida Unemployment Appeals Comm'n,* 598 So.2d 100 (Fla. 2d DCA), *rev. denied,* 605 So.2d 1268 (Fla. 1992). The standard is not that of the highly emotional, super sensitive employee. *Ritenour v. Unemployment Appeals Commission,* 570 So.2d 1106 (Fla. 5th DCA 1990). In the instant case it is undisputed that Brown's employment was not terminated when she walked off the job. It was terminated only at that point in time when she refused to return to work after the situation which allegedly caused her departure had been corrected by the employer.

In affirming the denial of unemployment benefits to an employee who voluntarily left his employment, the Third District in *Perez v. State, Dep't of Labor and Employment Sec.*, 377 So.2d 806, 807 (Fla. 3rd DCA 1979), succinctly stated the correct legal principle applicable to this case:

> Our affirmance is based primarily upon the familiar principle that this court lacks authority to interfere with an administrative decision based upon an acceptable view of the evidence below. *See Florida Industrial Commission v. Ciarlante*, 84 So.2d 1 (Fla. 1955); *Lundy's Market, Inc. v. Florida Department of Commerce*, 373 So.2d 433 (Fla. 3d DCA 1979), and cases cited. We simply may not substitute our judgment for the referee's conclusion. . . .

See also Ritenour v. Unemployment Appeals Comm'n.

We affirm the lower tribunal.

HARRIS, C.J., and GOSHORN, PETERSON and THOMPSON, JJ., concur.

DAUKSCH, J., dissents with opinion, with which GRIFFIN and DIAMANTIS, JJ., concur.

GRIFFIN, J., dissents separately with opinion.

W. SHARP, J., recused.

DAUKSCH, Judge, dissenting.

Both the commission and the majority opinion have correctly stated the applicable law while misapplying it to this case.

The question on appeal, which is erroneously answered by the majority, involves the "good cause attributable to the employer" concept which is ingrained in the unemployment compensation law. The improper application of the concept coupled with the determination that this employee voluntarily left her job has lead the commission and the majority into their significant error.

An examination of the facts leads to the inescapable conclusion that this employee did not voluntarily leave her employment. It is obvious that the cause for her leaving was good cause, and as between the two, employer and employee, it was attributable not to her, but to her employer.

Appellant was employed at Jacobs and Goodman, P.A., a law firm, as a legal assistant from July 31, 1991 until January 30, 1992. Brown proved that a coemployee of Jacobs and Goodman, P.A., who takes personal injury calls and does maintenance on the weekends, sexually harassed her verbally on almost a daily basis and physically four or five times. The coemployee's office was on the same floor as Brown's workstation. The incidents were initially verbal. The coemployee stated that "he liked [her] ass," and "he would like to eat [her]." The first physical incident was in August or September when the coemployee touched her behind. Brown also testified that the coemployee rubbed her back, exposed himself to her and made sexual gestures with his tongue. On a Saturday afternoon in December, when both Brown and the coemployee were working, the coemployee stopped Brown by the doorway and pulled up her top and started to pull down her pants and pulled his penis out. Brown panicked and left as quickly as she could.

On January 30, 1992, the principal partners became aware of the allegations and asked Brown about the sexual harassment. They put Brown on four to five days paid leave of absence and indicated that they would hold her job open

for a time but that if she did not return to work after the paid leave of absence, she would not get paid for the additional time off.

Brown spoke to the partners on Sunday, Monday and Wednesday of the following week about returning to work. They wanted to assign Brown to another attorney in the main building. The coemployee did not work in the main building but his wife did and Brown did not want to work in the same building as the coemployee's wife. Coemployee's wife is the firm administrator, responsible, *inter alia,* for all personnel matters. Brown's psychologist advised her that she should not return to the work environment of Jacobs and Goodman, P.A., unless both the coemployee and his wife were no longer working for the law firm.

Approximately a month later Jacobs and Goodman, P.A. offered Brown the position of employment that she held before she took a paid leave of absence. Brown was not aware that the coemployee had been placed on a leave of absence and would, therefore, not be in the building. Brown refused to return to work because no matter where they put her, she would see the coemployee's wife on a daily basis. Brown did not return to Jacobs and Goodman, P.A., and applied for unemployment benefits while she searched for employment elsewhere.

Brown should not be disqualified from unemployment compensation benefits if she voluntarily left employment with good cause attributable to her employer. Section 443.101(1)(a); *Krueger v. Unemployment Appeal Comm'n,* 555 So.2d 1225, 1228 (Fla. 2d DCA 1989). Brown did leave employment for good cause. "Good cause" has been defined as a reason that would be deemed valid by reasonable men and women and that is not indicative of an unwillingness to work. *Id.* at 1228. Brown was willing to work but did not want to work in an environment where she had previously

been subjected to sexual harassment and feared that she may again be subjected to sexual harassment by the coemployee or possibly harassment from his wife. Brown's reason for voluntarily leaving employment meets the definition of "good cause" and is attributable to her employer. Although Brown's employer did not condone the conduct that caused her to leave employment, the conduct can be attributed to her employer. An employer is responsible for the work environment in which the employees must work, so failure to provide Brown with a tolerable work environment is good cause for leaving employment attributable to the employer. *Lovett v. Florida Unemployment Appeals Comm'n,* 547 So.2d 1253, 1254 (Fla. 1st DCA 1989); *Wilson v. Florida Unemployment Appeals Comm'n,* 604 So.2d 1274 (Fla. 4th DCA 1992). In *Lovett,* the court found that the employer's failure to intercede in a dispute between appellant and a coemployee was sufficient to meet the good cause standard and avoid loss of unemployment compensation benefits. *Lovett,* 547 So.2d at 1254. In *Wilson,* the court found that the change in the employee's work hours was a material breach of an employment agreement and constituted good cause for leaving employment attributable to the employer. *Wilson,* 604 So.2d at 1274. If an employer either wilfully or negligently permits the workplace to become so intolerable so as to endanger the physical or emotional well-being of an employee, then that employee has every right to leave. Because Jacobs and Goodman, P.A., did not provide Brown with a safe, harassment-free work environment, she should be permitted to terminate employment voluntarily and still receive unemployment compensation benefits.

I would reverse the decision of the commission and remand for an award of unemployment compensation.

GRIFFIN and DIAMANTIS, JJ., concur

GRIFFIN, Judge, dissenting.

In August, 1991, Fran Brown, who was employed as a legal assistant for the law firm of Jacobs and Goodman, P.A. ["Jacobs and Goodman"], became the victim of various acts of sexual battery and harassment in her workplace. The perpetrator of these repeated, overt, and disgusting acts was a male coemployee who was married to the firm's administrator. That these acts occurred was not disputed. Ms. Brown testified she endured these indignities because she was afraid that, if she complained, she would lose her job.[1] Her fears proved prophetic. When she confided in certain coworkers, they brought the matter to the attention of the firm's principals. Their response was to give her three days' paid leave, after which they merely offered to move *her* to another building, which was away from the harasser, but in the same work area as the harasser's wife. When she declined to return to work under those circumstances, Jacobs and Goodman successfully defeated her effort to obtain unemployment compensation on the ground that her decision not to continue working there was not "attributable" to her employer.

It will no doubt surprise many people to learn that if they are battered by a coemployee, they cannot quit their jobs and collect unemployment for that reason. The Unemployment Appeals Commission and the majority opinion in this case make clear that the employee has a duty to "preserve the employer/employee relationship" by putting the employer on notice of the coemployee's battery and by giving the employer a chance to take measures to prevent the offense from recurring. The majority opinion does not single out

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[1]"[H]is wife is the firm administrator, she's the one that hires and fires."

sexual harassment as a species of assault or battery of lesser concern than any other. There is no suggestion that a nonconsensual sexual touching is qualitatively different than a punch in the mouth. According to the majority, no matter what the nature of the coemployee's attack, whether assault, mayhem, rape, attempted murder or sexual harassment, it cannot be "attributable to the employing unit," permitting the victim to quit and collect unemployment compensation, if the employer isn't on notice that the employee is at risk.

As Judge Dauksch has expressed, the majority is led into this error by incorrectly equating "attributable to the employer" with "wrongful conduct" by the employer. The issue is not whether the employer's conduct was "wrongful" in the tort sense, but simply whether the cause for leaving is "attributable to the employer" as opposed to being "attributable to the employee." "The Unemployment Compensation law is to be liberally construed in order to achieve its declared purpose of providing relief to persons not employed through no fault of their own." *Dean v. Florida Unemployment Appeals Comm'n,* 598 So.2d 100, 101 (Fla. 2d DCA), *rev. denied,* 605 So.2d 1268 (Fla. 1992). However, if "fault" is necessary to demonstrate that good cause to quit was attributable to the employer, this requirement seems fully satisfied by the fact that it was the employer who hired the harasser, who had the duty to supervise him and who had the duty to provide the victim with a safe workplace. This employer delegated his supervision to someone unwilling or unable to prevent his misconduct and who (evidently) did not detect this harasser's repeated and overt sexual acts in its workplace for a period in excess of five months. Ignorance of the fact that the workplace is dangerous ought not insulate the employer.

The rule the majority approves is that sexual harassment cannot be attributable to the employer (no matter how lax or willfully ignorant) until the employer is given notice of the

harassment. The employee must give notice of the coemployee's battery and then keep working long enough to show either that the employer would not take measures to prevent reoccurrence or that it happened again. Such a rule encourages ignorance and passivity on the part of the employers and results in the tacit intimidation of victims, who are afraid of losing their jobs.

While I certainly agree with the majority that sexual harassment should not be treated with any less dignity than any other battery committed by a coemployee in the workplace, sexual harassment may, in fact, be entitled to greater dignity in the context of statutory remedies such as workers' compensation and unemployment compensation. In *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So.2d 1099, 1102-1104 (Fla. 1989), the court considered the question whether workers' compensation immunity was available to an employer in a context where female employees were sexually harassed by coemployees. The *Byrd* court reviewed the plethora of statutory and rule provisions that express the strong public policy against workplace sexual harassment. The supreme court said:

> The clear public policy emanating from federal and Florida law holds that *an employer is charged with maintaining a workplace free from sexual harassment*. . . . While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self-esteem.

552 So.2d at 1104. [Emphasis added]. Sexual harassment, thus, has been made the *direct responsibility* of the employer as a matter of public policy. *Professional Tel. Ans. Serv., Inc. v. Groce*, 632 So.2d 609 (Fla. 2d DCA 1993). As a matter of public policy, the employer is not allowed to plead ignorance. If this public policy is so strong that it abrogates the worker's compensation immunity, thereby exposing the

employer to tort damages for breach of its duty to provide the employee with a workplace free of sexual harassment, then, surely, an act of sexual harassment in the workplace is "attributable to the employer" for purposes of unemployment compensation.[2]

There is yet a more moderate approach preferable to the majority's. Recently, the Vermont Supreme Court addressed this issue in Allen v. Department of Employment and Training, 618 A.2d 1317 (Vt. 1992). In that case, the Employment Security Board had denied plaintiff unemployment benefits because, before quitting her job, she did not give notice to her employer's business manager or someone in similar authority that she was being sexually harassed by her supervisor. Vermont's unemployment compensation statute is virtually identical to our own. 618 A.2d at 1319.

The Vermont court noted initially that an employee who is sexually harassed on the job by a coworker may well have "good cause" to quit. 618 A.2d at 1319. On the question whether quitting is "attributable to the employer" in the context of sexual harassment, the court observed that any requirement of notice to the employer is problematic. Victims are unlikely to complain due to fear of disbelief, the embarrassment of revealing the kinds of acts to which they have been subjected, and fear of reprisal. *Id.* "Nevertheless," said the court, "the sexual harassment victim is 'precisely the type of claimant unemployment compensation benefits are designed to assist: a worker who is committed to working, yet

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[2]As expressed by the Supreme Court of Oregon: The [unemployment compensation] statute does not demand as a matter of law that "an employee" sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits. *McPerson v. Employment Division*, 285 Or. 541, 591 P.2d 1381, 1390 (1979).

finds her present working conditions intolerable'." *Id.* at 1319-20. The Vermont court concluded that an unemployment claimant who fails to give the employer an opportunity to remedy the harassment is not necessarily precluded from receiving benefits. 618 A.2d at 1320. The court determined that sexual harassment by a coworker will not be "attributable to the employer" only if the employer can show it has mechanisms in place that are calculated to protect the particular employee against sexual harassment. *Id.* at 1320. This might include having policies sufficient to alert employees to their employer's interest in preventing that form of discrimination and which are calculated to encourage victims of harassment to come forward. This approach has the salutary effect of encouraging an employer to take appropriate measures.

In the present record, the employer offered no evidence that it had made any effort to discourage sexual harassment, and the repeated and flagrant nature of this employee's conduct suggests there was little supervision exercised over the workplace in general and over this harasser in particular – not surprising in view of the fact that his own wife was his supervisor. Once Ms. Brown proved she had been sexually harassed in the workplace and the employer offered no evidence that it had taken reasonable measures calculated to prevent such attacks, there was "good cause" to quit, attributable to the employer.

The referee below also concluded that an employee is not entitled to "speculate" about the adequacy of the employer's proposed remedy and that this employee's refusal to give it a chance was not what a "reasonable person" would do. The majority concludes that Ms. Brown refused to return to work "after the situation. . . had been corrected" by Jacobs and Goodman. But the employer's supposed correction and proposed remedy presented at least two problems. First, the harasser would still be, from time to time, and perhaps on

Saturdays, in her workplace. Second, even if her fears of further attacks could have been so assuaged, the emotional trauma caused by the harassment would not abate, much less heal, in such an environment. She would have to work in a law firm where everybody knows what this man did to her, where he remained employed[3] and where his wife would be her supervisor. To say Ms. Brown's reluctance to return to work was "unreasonable" suggests the view that she suffered no "real" injury from these repeated sexual attacks that "reasonably" could affect her. Yet her psychologist advised against returning under the proffered conditions.

As this court and others in this state have repeatedly said, "good cause" for quitting are "those circumstances which would impel the average, able-bodied, qualified worker to give up his employment." The applicable standard is one of reasonableness applied to the average man or woman, not to the supersensitive, *Uniweld Products, Inc. v. Industrial Relations Commission, Florida Department of Commerce,* 277 So.2d 827 (Fla. 4th DCA 1973),[4] and this court can say what

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[3]It appears that in mid-February, Jacobs and Goodman finally decided to put the harasser on unpaid leave, but this had not occurred when Ms. Brown refused to return to work.

[4]*See, e.g., Uniweld,* 277 So.2d at 829; *see also Break 'n Eat Corp. v. Commonwealth of Pennsylvania, Unemployment Compensation Bd. of Review,* 60 Pa.Cmwlth. 13, 426 A.2d 1262, 1263 (1981). There, an employee beaten by a management official, quit his job without notifying the employer. The court said:

> In this case, claimant's fear and apprehension were emotional reactions caused by the severe beating imposed upon him his last day of work. Such fear and apprehension were, therefore, grounded in reality. We believe it is reasonable to conclude that the beating incident can be deemed to have provided the claimant with real, not imaginary, substantial, not trifling reasons which 'compelled' his termination of employment.

is reasonable and what is not. In *Tannariello v. Federation of Public Employees,* 437 So.2d 799 (Fla. 4th DCA 1983), the employee, "afraid" of future harm due to the location of her work environment, quit her job and sought unemployment. As in this case, the appeals referee in *Tannariello* called the employee's attitude "supersensitive" and found it was not attributable to the employer. The appellate court reversed the referee's decision, concluding that her fears met the legal test for "good cause" to quit. Given what happened to the victim in her workplace, I do not agree that her reluctance to return to work was "supersensitive;" the "good cause attributable to the employer" test is plainly met. *See also Smalls v. State, Unemployment Appeals Comm'n,* 485 So.2d 1 (Fla. 2d DCA 1985), *rev. denied*, 492 So.2d 1335 (Fla. 1986).[5]

I concur in the dissent of Dauksch, J., and would reverse the denial of unemployment compensation benefits.

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[5]In *Smalls,* an extremely religious construction worker quit because of the obscene language present at the work site. Although the *Smalls* court did mention that the worker had not sought corrective action, the basis for the court's decision was the worker's refusal to identify the language during his hearing, which made it impossible to determine if the work environment was abusive. The court's opinion suggests that if the work environment were abusive, Smalls would be entitled to collect unemployment.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT

FRAN T. BROWN,

Appellant,

v. CASE NO. 93-637

UNEMPLOYMENT APPEALS COMMISSION and JACOBS AND GOODMAN, P.A.,

Appellee.

DATE: March 14, 1994

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR CERTIFICATION, filed February 16, 1994, and Appellant's MOTION FOR REHEARING, filed February 17, 1994, are denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK
BY: _____
Deputy Clerk

(COURT SEAL)
cc: Eli H. Subin, Esq.
Robert W. Thielhelm, Esq.
Unemployment Appeals Comm.

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY UNEMPLOYMENT COMPENSATION APPEALS BUREAU

PROMENADE BLDG., 5600 DIPLOMAT CIRCLE, SUITE 130
ORLANDO, FLORIDA 32810

NOTICE OF DECISION OF APPEALS REFEREE

Docket No. 92-1469OU Jurisdiction: §443.151(4)(a)&(b) F.S.

CLAIMANT
S. S. No. 264-49-6118

FRAN T. BROWN
3208 BRIAR WAY
APOPKA FL 32703

THOMAS P MORAN, ATTORNEY AT LAW
SUBIN, SHAMS, ROSENBLUTH & MORAN
111 NORTH ORANGE AVENUE, SUITE 900
ORLANDO FL 32801

EMPLOYER/APPELLANT
No. 0278971B

JACOBS & GOODMAN, PA
890 S R 434 NORTH
ALTAMONTE SPRINGS FL 32714

ROBERT THIELHELM, JR.
BAKER AND HOSTETLER
2300 SUN BANK CENTER
P O BOX 112
ORLANDO FL 32802-0112

Other copies mailed to: UCCO 3632
APPEARANCES: Claimant - yes Employer - yes

IMPORTANT: This decision will become final unless within 20 calendar days after the date it is mailed, you file an appeal to the Unemployment Appeals Commission, Room 300, Webster Building, 2671 Executive Center Circle, West, Tallahassee, Florida 32399-0681.

ISSUES INVOLVED: **LEAVE:** Whether the claimant's unemployment is due to a leave of absence voluntarily initiated by the claimant, pursuant to Section 443.101(1)(c), Florida Statutes.

SEPARATION: Whether the claimant voluntarily left work with good cause, provided that good cause includes such cause as is attributable to the employing unit or consists of illness or disability of the claimant requiring separation; or whether the claimant was discharged for misconduct connected with work and, if appropriate, the number of weeks of disqualification, pursuant to Sections

443.101(1) and 443.036(26), Florida Statutes, and Florida Administrative Code Rule 38B-3.020.

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant shall be charged to the employment record of the employer pursuant to Sections 443.101(9) and 443.131(3)(a), Florida Statutes, and Florida Administrative Code Rules 38B-2.026 and 38B-3.018.

FINDINGS OF FACT: The claimant was employed as a legal assistant for a law firm from July 31, 1990, to January 30, 1992. Beginning in August 1991, the claimant was sexually harassed by a co-worker, who worked on the same floor as the claimant. The co-worker did not work in a supervisory capacity. The sexual advances were initially verbal. The co-worker told the claimant "I like your ass" and "I'd like to eat you." At first the verbal sexual advances occurred once a week. Then incidents began occurring almost daily. The claimant told the co-worker that she was not interested, but his behavior continued. The co-worker and the claimant both worked until 6 p.m. In addition, the claimant also worked occasional overtime on Saturdays. Incidents occurred primarily in the kitchen, after 5:30 p.m., and on Saturdays. The co-worker would bump into the claimant at work, and touch her. On approximately four to five occasions, the co-worker took his penis out and exposed himself to the claimant. The co-worker also lifted up the claimant's blouse. The claimant could have changed her work hours so that she would leave before the co-worker, but she chose not to do so because the hours were convenient for her child care arrangements. The claimant never directly informed the employer that she was the victim of unwelcome sexual advances until January 1992. However, the claimant told her husband, father-in-law, mother-in-law, and two to three girlfriends about the harassment since it began. In December 1991, the claimant told an attorney in the firm, who was not a supervisor, that she was being sexual harassed by a co-worker. The claimant disclosed this information to the attorney so that he would be there when the claimant worked late. The claimant never told her employer about the sexual harassment because she thought that she could handle it herself. The claimant believed that she could get another job. The claimant also believed that she would be fired, since the harasser's

wife was the administrator of the law firm. The administrator hired the claimant, and also had the authority to discharge. In January 1992, the claimant told a legal assistant in the law firm about her situation, and told her not to tell anyone. Approximately one to two weeks later, on January 28, 1992, the claimant's supervisor approached her, and questioned her about the harassment. The claimant and supervisor agreed to meet on January 31, 1992, when the claimant's husband could be present. The senior attorneys learned of the claimant's allegations prior to the scheduled meeting. On January 30, 1992, they met with the claimant, and placed her on paid administrative leave for four to five days. On February 2, 1992, the senior attorneys contacted the claimant, and told the claimant that they wanted her to return to work. The claimant was told that her work location would be changed, and she would be assigned to work in the main building. The administrator, the harasser's wife, worked in the main building, and the co-worker would have access to the building since he rode to work with his wife, and he had to obtain supplies in this building. The claimant refused to return to work. The claimant's refusal was based upon the advice of her attorney, the psychologist whom she began seeing in February 1992, and because the wife of the co-worker worked in the main building. The claimant would have refused to return to work even if the co-worker was not permitted to be near her. The claimant believed that she would be unable to work with the harasser's wife, even though the harasser's wife had no knowledge of the situation, and had never caused the claimant any harm. The claimant was asked to cooperate in the investigations conducted by the employer. The claimant refused. The claimant quit her job on or about February 5, 1992, when she refused to return to work after her leave of absence was over.

CONCLUSIONS OF LAW: The unemployment compensation law provides that a claimant who has voluntarily left work without good cause or has been discharged by the employing unit for misconduct connected with the work shall be disqualified from receiving benefits.

The record and evidence in this case show that the claimant quit her job when she refused to return to work after her leave of absence was over.

The law further provides that a claimant who has voluntarily left work without good cause as defined in the statute shall be disqualified from receiving benefits. "Good cause" includes only such cause as is attributable to the employing unit or which consists of any illness or disability of the claimant requiring separation from the work.

The record and evidence in this case show that the claimant voluntarily quit her job when she refused to return to work after a leave of absence.

When an individual leaves work voluntarily, as the claimant did, she carries the burden to show that her leaving was with good cause attributable to the employer, in order to qualify for unemployment compensation benefits. That burden has not been met in this case.

There was no evidence that the employer had any idea that the claimant was a victim of unwelcome sexual advances until the end of January 1992. The claimant told several family members, two girlfriends, and two co-workers. The claimant never told anyone in authority that she was being sexually harassed. It appears obvious that the only way that the employer knew of the situation was because the claimant told a co-worker, who apparently told the claimant's supervisor. The claimant acknowledged the situation when confronted. The employer immediately placed the claimant on a paid leave of absence for several days, in order for them to investigate the claimant's allegations. The employer asked the claimant to cooperate with the investigations, one of which was an outside investigation. The claimant refused to cooperate in any investigation conducted by the employer. The employer moved the claimant's work location to another building, but the claimant found this to be unacceptable because the harasser's wife worked there. The claimant stated at the hearing that even if the harasser would have no access to her, she still could not return to the work place because the harasser's wife worked there. The claimant further testified that the harasser's wife had no knowledge of the events, and had not caused the claimant any harm. The claimant determined that the employer's offer to remedy the situation was inadequate, and she refused to work in the new location.

The employer was entitled to a reasonable amount of time to investigate the situation, and determine if the claimant's allegations were true. The claimant speculated that the employer's remedy would not work. The claimant failed to act as a reasonable person in attempting to preserve the employer/employee relationship. Therefore, it can only be concluded that the claimant voluntarily quit her job without good cause attributable to the employer, and she is disqualified from the receipt of benefits.

DECISION: The determination of the claims adjudicator, dated March 13, 1992, is hereby reversed. The claimant is disqualified from the receipt of benefits from the week ending February 8, 1992, and until she becomes reemployed and earns $3077. The employer's account (0278971B) is relieved of charges in connection with benefits paid on this claim.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on November 4, 1992.

PATRICIA M. ZEIS
Appeals Referee

By: Krystal Martinez
Deputy Clerk

STATE OF FLORIDA
UNEMPLOYMENT APPEALS COMMISSION

In the matter of:

Claimant/Appellant
FRAN T BROWN
SS No. 264-49-6118

vs. U.A.C. Order No. 92-09895

Employer/Appellee
JACOBS & GOODMAN PA
Employer No. -0278971B

UCCO-3632 WINTER PARK

ORDER OF UNEMPLOYMENT APPEALS COMMISSION
NO. 92-09895

Upon review pursuant to Section 443.151(4)(c), Florida Statutes, it is found that the decision of the appeals referee is in accord with the essential requirements of law and is, therefore, affirmed.

It is so ordered.

UNEMPLOYMENT APPEALS COMMISSION

R. Carlson Dyal, Chairman
James A. Hammond, Member
Charlie Harris, Member

This is to certify that on,

FEB 16 1993,

the above Order was filed in the office of the Clerk of the Unemployment Appeals Commission, and a copy mailed to the last known address of each interested party.

By: *Carol L. Hart*
Deputy Clerk

SUPREME COURT OF FLORIDA

TUESDAY, AUGUST 16, 1994

FRAN T. BROWN,	*	
	*	CASE NO: 83,534
Petitioner,	*	District Court of Appeal,
	*	5th District - No. 93-637
v.	*	
	*	
UNEMPLOYMENT APPEALS COMMISSION, et al.,	*	
	*	
	*	
Respondents.	*	
* * * * * * * * * * * * * * * * * *	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. See Fla. R. App. P. 9.330(d).

GRIMES, C.J., OVERTON, HARDING, JJ., and McDONALD, Senior Justice, concur.
SHAW, KOGAN and WELLS, JJ., dissent.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court
(Court Seal)

BAH
cc: Hon. Frank J. Habershaw, Clerk

Thomas P. Moran, Atty.
John M. Brennan, Atty.
Kelly T. Blystone, Atty.
Robert W. Thielhelm, Jr., Atty.
John W. Kunberger, Atty.

SUMMARY OF ARGUMENT

Brown was an innocent victim of vicious sexual battery and harassment at work on the premises of Jacobs and Goodman, P.A. Sexual harassment violates Florida and federal law. Further, Florida's unemployment compensation statute is to be liberally construed in favor of claimants, like Brown, who are not employed through no fault of their own. Brown should have been permitted to leave the Jacobs and Goodman law firm because of the harassment and receive unemployment compensation while she sought other employment. The Fifth District's decision to affirm the denial of unemployment compensation benefits to Brown seriously undermines the strong public policy of Florida and the federal government in favor of eliminating workplace sexual harassment and protecting unemployment compensation claimants. The conflict created by the Fifth District's decision is intolerable and warrants this Court's immediate attention.

Brown submits that this Honorable Court should accept jurisdiction of this case and reverse the decision of the Fifth District.

ARGUMENT

THE FIFTH DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT AND THE FIRST, SECOND AND FOURTH DISTRICTS CONCERNING THE CORRECT LEGAL STANDARD AND CIRCUMSTANCES UNDER WHICH AN EMPLOYEE/VICTIM OF WORKPLACE SEXUAL BATTERY AND HARASSMENT IS ENTITLED TO RECEIVE UNEMPLOYMENT COMPENSATION BENEFITS.

Brown respectfully submits that the Fifth District's decision expressly and directly conflicts with the decision of

this Court in *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099 (Fla. 1989) which requires that the unemployment compensation statute be construed along with state and federal enactments dealing with sexual harassment so that the policies of both are preserved to the greatest extent possible. In *Byrd*, this Court held that the Florida workers' compensation statute did not provide the exclusive remedy for a claim based on sexual harassment in the workplace. This Court decided that the exclusivity rule under workers' compensation law could not be applied in a manner that effectively abrogates the policies of other law. Further, this Court declared that the courts of this state are obligated to construe and apply state statutes in harmony with the law proscribing sexual harassment so that the goals of both are fully promoted.

Both the state of Florida and the federal government have firmly committed themselves to outlawing and ending sexual discrimination and harassment in the workplace. *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d at 1102-03 ("The statutes, case law and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms. . . . Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets".).[3] The ideal of freedom from all

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[3] As Judge Griffin noted in her dissent:

> If this public policy is so strong that it abrogates the workers' compensation immunity, thereby exposing the employer to tort damages for breach of its duty to provide the employee with a workplace free of sexual harassment, then, surely, an act of sexual harassment in the workplace is "attributable to the employer" for purposes of unemployment compensation.

forms of invidious discrimination is deeply rooted in the American concept of justice. One of the most important roles of our courts, both historically and now, is to turn this vision and ideal of freedom from discrimination into a living reality. There are no more important questions facing our courts than those dealing with the complete eradication of all forms of illegal discrimination, including sexual harassment.[4]

Similarly, the Florida legislature has expressly declared that "economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state." Further, that unemployment is "the greatest hazard of our economic life" requiring protection to lighten the burden which "so often falls with crushing force upon the unemployed worker and his family." Section 443.021, Florida Statutes (1993).

Thus, this Court has held that Florida's unemployment compensation statute, which is part of a nationwide employment security program, is to be liberally construed in favor of claimants to achieve its declared remedial purpose of providing relief to persons not employed through no fault of their own. *Gulf County School Board v. Washington*, 567 So. 2d 420 (Fla. 1990); Sections 443.021, 443.031, Florida Statutes (1993); *Dean v. Florida Unemployment Appeals Comm'n*, 598 So. 2d 100, 101 (Fla. 2d DCA 1992); *Smallwood v. Florida Dept. of Commerce*, 350 So. 2d 121 (Fla. 4th DCA 1977).

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[4]Since *Byrd*, the Florida legislature enacted the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes (1993). The purpose for this statute is to secure freedom from discrimination for all individuals within Florida, to protect their interest in personal dignity, to make available to the state their full productive capacities and to promote the interests, rights and privileges of individuals within this state.

Sexual harassment in the workplace is a serious threat to the dignity and safety of many employees, particularly those who cannot afford to leave a job and be without income, even when confronted with a dangerous and insufferable work environment. The citizens of this state deserve to work in an environment free from intimidation, fear and physical danger. When an employee has been subjected to odious and unlawful acts of harassment committed in their workplace, the employee should at least be permitted to leave that job without losing the safety net created by the legislature to mitigate the financial hardship of unemployment.

The clear and compelling public policy in favor of abolishing workplace sexual harassment and sustaining unemployment compensation claimants is severely weakened by the Fifth District's decision. The Fifth District's decision is thus in direct conflict with this Court's decisions in *Byrd* and *Gulf County School Board*. Review of the Fifth District's decision is essential to maintain the integrity and force of this Court's decisions and the express public policy of Florida and the federal government. Therefore, the Court should accept jurisdiction over this case.

CONCLUSION

The Fifth District's decision in *Brown v. Unemployment Appeals Commission and Jacobs and Goodman, P.A.* is in express and direct conflict with the decisions of this Court in *Byrd v. Richardson-Greenshields Securities, Inc.* and *Gulf County School Board v. Washington* and with decisions of the First, Second and Fourth District Courts of Appeal concerning an issue of great public importance; the correct legal standard and circumstances under which an employee/victim of workplace sexual battery and harassment should be entitled to receive unemployment compensation benefits. Review by this Court is required to settle the conflict and to preserve the important public policy aims of ending workplace sexual

harassment and assisting claimants unemployed through no fault of their own. Brown respectfully requests that this Honorable Court accept jurisdiction of this case and reverse the decision of the Fifth District Court of Appeal.

Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-850

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FRAN T. BROWN,

Petitioner,

v.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION AND JACOBS AND GOODMAN, P.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN W. FOSTER, SR.
(COUNSEL OF RECORD)
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QUESTION PRESENTED

Whether the Fifth District Court of Appeal of Florida was correct when it affirmed the Appeals Referee's decision finding that the Petitioner had voluntarily left her employment without good cause attributable to her employer, on the basis that the appellate court lacked authority to interfere with an administrative decision based on an acceptable view of the evidence and should not substitute its judgment for the conclusions of the Appeals Referee.

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STATEMENT OF THE CASE

Respondent, Jacobs and Goodman, P.A., submits that the Petitioner's Statement of the Case contains inaccuracies and omissions. In response thereto, Respondent adopts the findings of fact and conclusions of law presented by Appeals Referee, Patricia M. Zeis, in her Notice of Decision of Appeals Referee (Petitioner's Appendix at pp. 19a-23a)[1] and the Fifth District Court of Appeal of Florida in *Brown v. Unemployment Appeals Commission and Jacobs and Goodman, P.A.*, 633 So.2d 36 (Fla. 5th DCA 1994) (*en banc*). (Petitioner's Appendix at pp. 1a-17a). Additionally, Respondent emphasizes the following clarifications:

1. Petitioner mischaracterizes the decisions below. The Appeals Referee found that Petitioner had failed to act as a reasonable person in attempting to preserve the employer/employee relationship, and, therefore, Petitioner had voluntarily left her employment without good cause attributable to her employer. (Petitioner's Appendix at pp. 22a-23a). The Florida Unemployment Appeals Commission affirmed, finding "that the decision of the Appeals Referee is in accord with the essential requirements of law . . . ." (Petitioner's Appendix at p. 24a). The Fifth District of Court of Appeal of Florida, *en banc*, affirmed on

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[1]In support of this Brief in Opposition, Respondent will cite to the record below as follows: (R. at p. ___). Further Respondent will cite to the Appendix to the Petition for Writ of Certiorari as follows: (Petitioner's Appendix at p. ___). Finally, Respondent will cite to the Petition for Writ of Certiorari as follows: (Petition for Writ at p. ___).

the basis that it lacked authority to interfere with an administrative decision based on an acceptable view of the evidence and refused to substitute its judgment for the Appeals Referee's conclusions. (Petitioner's Appendix at pp. 6a-7a).

2. Petitioner asserts that "Brown's harasser was a senior, non-attorney who worked for one of the named partners of the Jacobs and Goodman law firm." (Petition for Writ at p. 4). This statement has no support in the record and is not consistent with Petitioner's testimony below. (R. at pp. 48-49, 57). Petitioner testified that she was not sure what title her harasser held, but that her harasser handled personal injury calls, ran errands and did maintenance on the weekends. (R. at pp. 48-49, 57). Further, the Appeals Referee found that Petitioner's harasser was a "co-worker," who "did not work in a supervisory capacity." (Petitioner's Appendix at p. 20a).

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO PROPERLY PRESERVE A FEDERAL QUESTION

Noticeably absent from Petitioner's Statement of the Case is any indication as to what stage of the proceedings below Petitioner raised the relevant federal issues to be decided by this Court as required by Supreme Court Rule 14.1(h). However, Petitioner appears to assert that Petitioner's jurisdictional brief to the Supreme Court of Florida raised

the relevant federal issues in a manner sufficient to establish the jurisdiction of this Court. (*See* Petition for Writ at p. 2, n. 1).

The vague references to federal law and public policy contained in Petitioner's jurisdictional brief to the Supreme Court of Florida are insufficient to properly preserve this Court's appellate jurisdiction over state court judgments under 28 U.S.C. §1257. As this Court has held, "there should be no doubt from the record that a claim under a *federal* statute or the *federal* constitution was presented in state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Although Petitioner's jurisdictional brief to the Supreme Court of Florida used the terms "federal law" and the "public policy of . . . the federal government," no where did Petitioner expressly rely on any specific provision of federal law. Petitioner did not invoke the Federal Constitution, Title VII of the Civil Rights Act of 1964 ("Title VII"), Section 503(a)(1) of the Social Security Act, or any prior decisions of this Court, *i.e.*, the jurisdictional bases the Petitioner now raises for the first time in her Petition for Writ to this Court.

In fact, nothing in Petitioner's jurisdictional brief to the Supreme Court of Florida indicated that the federal law or public policy was different from the applicable state law or public policy, thereby informing the state court that it had been presented with a federal claim. *See Board of Directors of Rotary Int'l. v. Rotary Club*, 481 U.S. 537, 550 n. 9

(1987). For example, Petitioner's jurisdictional brief to the Supreme Court of Florida merely stated that "[s]exual harassment violates Florida and federal law." (Petitioner's Appendix at p. 27a). Elsewhere, Petitioner's jurisdictional brief to the Supreme Court of Florida stated that "[r]eview of the Fifth District's decision is essential to maintain the integrity and force of this court's decisions and the express public policy of Florida and the federal government." (Petitioner's Appendix at p. 30a).

Additionally, Respondent respectfully submits that this Court lacks jurisdiction to consider these federal issues because the Supreme Court of Florida did not rule on any federal issues. (Petitioner's Appendix at p. 26a). When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983). Significantly, Petitioner has made no attempt to, and cannot, establish that she raised conflicts with federal statutes, decisions of this Court, or the Federal Constitution prior to seeking review in the Supreme Court of Florida.[1]

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[1]Petitioner cannot point to other stages in the case below to establish that she properly and timely preserved her federal issues. At no time did she or the lower appellate courts, including the Appeals Referee and the Florida Unemployment Appeals Commission, address or raise any federal issues. Even the Petitioner's Motion for Certification of a Question of Great Public Importance to the Fifth District Court of Appeal of Florida failed to raise or assert a conflict with the Federal Constitution, federal statutes or this Court's decisions.

As Petitioner is unable to make such a showing, it must therefore "be assumed" that the Supreme Court of Florida failed to pass on the federal issues due to her failure to raise them at any stage during the proceedings below.[2]

II. CERTIORARI SHOULD BE DENIED SINCE THERE IS NO "SPECIAL OR IMPORTANT" REASON TO GRANT REVIEW

This case does not present "special or important reasons" to justify further review by this Court. Sup. Ct. R. 10.1. The instant case does not involve a previously unsettled issue of law, create new law or involve a conflict with the Federal Constitution, federal statutes or prior decisions of this Court. Petitioner's mischaracterization of the decisions below is an obvious attempt to exaggerate their precedential effect and to convert that which is a factual determination into a basis for the issuance of a writ of certiorari. As this Court has aptly observed in the past, "[w]e do not grant certiorari to review evidence and discuss specific facts." *U.S. v. Johnson*, 268 U.S. 220, 227 (1925). *See N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n. 8 (1981) (grant of certiorari improvident as question of fact does not merit review).

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[2]The general practice of the Florida appellate courts is to refuse to consider issues raised for the first time on appeal. *See Penn v. Florida Defense Fin. and Accounting Serv. Center Auth.*, 623 So.2d 459, 462 (Fla. 1993); *Trushin v. State*, 425 So.2d 1126, 1130 (Fla. 1982).

Petitioner has simply ignored the Fifth District Court of Appeal of Florida's express acknowledgment of the "correct legal principal applicable to this case" quoted by Judge Cobb as follows:

> Our affirmance is based primarily upon the familiar principle that this Court lacks authority to interfere with an administrative decision based upon an acceptable view of the evidence below. We simply may not substitute our judgment for the referee's conclusion . . . . (Citations omitted).

This case was decided, *en banc*, by the Fifth District Court of Appeal of Florida based upon all the facts and record evidence. Obviously, future cases in this area will continue to be decided on a case-by-case basis. It is simply unnecessary to allow Petitioner additional argument. No special or important reasons to grant review exist, and Petitioner is merely seeking review of factual determinations.

III. THE DECISIONS BELOW DO NOT THWART AND HINDER THE ENFORCEMENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND SECTION 503(a)(1) OF THE SOCIAL SECURITY ACT AND DO NOT CONFLICT WITH AND UNDERMINE THIS COURT'S PREVIOUS DECISIONS

Petitioner urges that the decisions below "violate the Supremacy Clause of the Constitution because they thwart and hinder enforcement of Title VII of the Civil Rights Act of 1964 and Section 503(a)(1) of the Social Security Act" and that "these decisions conflict with and undermine this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993)." (Petition for Writ at pp. 5-6). In support of her argument regarding violation of the Supremacy Clause, Petitioner relies on *Nash v. Florida Indus. Comm'n.*, 389 U.S. 235 (1967). However, the instant case is clearly distinguishable from *Nash* according to this Court's rationale in *Baker v. General Motors Corp.*, 478 U.S. 621 (1986).

In *Baker*, this Court held that a state statute, declaring an employee ineligible for unemployment compensation if the employee financed a strike other than by paying regular union dues, was not preempted by portions of the National

Labor Relations Act ("NLRA") giving employees the right to engage in collective bargaining. *Id.* at 635-638. This Court in *Baker* distinguished *Nash* as follows:

> Thus, the central distinction between the *Nash* case and this one is that of the distinction between involuntary and voluntary unemployment that was recognized at the inception of the Social Security Act. The decision to file an unfair labor practice charge--even though it may in fact motivate a retaliatory discharge--cannot be treated as a voluntary decision to cause one's own unemployment without undermining an essential protection in the NLRA. But an employee's decision to participate in a strike, either directly or by financing it, is not only an obvious example of causing one's own unemployment--it is one that furthers the federal policy of free collective bargaining regardless of whether or not the state provides compensation for employees who are furloughed as a result of the labor dispute.

Id. at 637-638.

In the instant case, the Appeals Referee determined that the Petitioner had failed to act as a reasonable person in attempting to preserve the employer/employee relationship and, therefore, concluded that Petitioner had voluntarily caused her own unemployment without good cause

attributable to her employer. Similar to the decision to participate in a strike in *Baker*, Petitioner's refusal to participate in the investigation conducted by Respondent into the alleged harassment including an independent third party investigator (R. at pp. 110-112), Petitioner's admission that she would not return to work even if the harassing co-worker was completely removed from the work place because the harassing co-worker's wife worked for Respondent (R. at pp. 105-106) and Petitioner's refusal to return to work under various circumstances intended to limit her contact with the harassing co-worker (R. at pp. 100-104), provided competent, substantial evidence for the Appeals Referee to determine that Petitioner did not expend reasonable efforts to preserve her employment relationship and, therefore, caused her own unemployment.

Unlike the filing of an unfair labor practice charge in *Nash* which could not be treated as a voluntary decision to cause one's own unemployment without undermining a portion of the NLRA, failing to act as a reasonable person in attempting to preserve the employment relationship can be treated as voluntarily causing one's own unemployment without undermining either Title VII or Section 503(a)(1) of the Social Security Act. As noted by Petitioner, "the objective of Congress in establishing the unemployment compensation insurance program, as part of the Social Security Act, was to provide a substitute for wages lost during a period of unemployment which is not the fault of the employee." (Petition for Writ at p. 8). Obviously, an employee, such as Petitioner, who fails to act reasonably to

preserve the employer/employee relationship, is not an individual unemployed through no fault of her own.

Moreover, to hold that an employee is automatically entitled to unemployment compensation benefits when sexual harassment allegations are involved, irrespective of the actions taken by either the employee or the employer, would contradict the basic tenets of Title VII and the laws against sexual harassment. Notably, the Equal Employment Opportunity Commission Guidelines impose liability on an employer for sexual harassment between fellow employees[3] where the employer knew or should have known and failed to take immediate corrective action. 29 C.F.R. §1604.11(d)(1994). Denying unemployment compensation benefits to Petitioner because she failed to act as a reasonable person in attempting to preserve the employment relationship is also consistent with EEOC's Guidelines for enforcing Title VII in that it promotes and facilitates the employer's ability to fulfill its obligation to prevent and address occurrences of sexual harassment in the work place.

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[3]As noted previously, Petitioner's Statement of the Case mischaracterizes Petitioner's harasser as a "senior, non-attorney." Petitioner appears to imply that her harasser was more than a co-worker or fellow employee. Yet, as clarified by Respondent, such an implication is not supported by the record and is inconsistent with the factual findings of the Appeals Referee. *Infra* at p. 2. Petitioner testified that she was not sure what title her harasser held, but that her harasser handled personal injury calls, ran errands and did maintenance on the weekends. (R. at pp. 48-49, 57). The Appeals Referee found that Petitioner's harasser was a "co-worker," who "did not work in a supervisory capacity." (Petitioner's Appendix at p. 20a).

See generally Stroehman Bakeries, Inc. v. Local 776, 969 F.2d 1436, 1442 (3d Cir. 1992), *cert denied*, 113 S.Ct. 660 (1992); *Newsday, Inc. v. Long Island Typographical Union, No. 915*, 915 F.2d 840, 844-45 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991). Therefore, the decisions below are not only consistent with the stated purpose of the unemployment compensation law but also consistent with the laws and decisions prohibiting sexual harassment in the work place.

IV. THE RESULT SOUGHT BY PETITIONER WOULD RESULT IN CONFUSION AND CHAOS IN THE LAW

Ultimately, Petitioner asks this Court to do that which Petitioner has already expressly acknowledged it cannot do, *i.e.*, equate the tests for recovery under Title VII and the Florida Unemployment Compensation law.[4] The question presented by the Petition for Writ is "[w]hether a state may refuse to pay unemployment insurance benefits to employees forced to leave their jobs because of sexual battery and harassment in the work place?" In essence, Petitioner requests this Court to determine that all victims of sexual

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[4]Petitioner acknowledged that "the issue in this appeal is not whether Jacobs and Goodman would be liable to Ms. Brown under Title VII or any other sexual harassment laws. The test for recovery under Title VII and the Florida Unemployment Compensation Law are not identical and should not be confused." Reply Brief for Appellant filed by Petitioner in the Fifth District Court of Appeal of Florida at p. 13, n. 6.

harassment are automatically entitled to unemployment compensation benefits.[5] Such a determination would improperly require unemployment compensation appeals referees across the nation to make factual and legal determinations of whether actionable sexual harassment under Title VII has occurred before awarding unemployment compensation benefits.

If a victim of sexual harassment is automatically entitled to unemployment compensation benefits, then an unemployment compensation appeals referee would no longer be concerned with the standards for awarding unemployment compensation benefits when confronted with a claimant alleging sexual harassment; rather, the unemployment appeals referee would be required to make a determination of liability under Title VII. Clearly, Congress did not intend to equate Title VII with Section 503(a)(1) of the Social Security Act. Such a result would lead to confusion in the enforcement of both Title VII and Section 503(a)(1) of the Social Security Act.

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[5]Notably, if Petitioner's contention is *not* that all victims of sexual harassment are automatically entitled to unemployment compensation benefits, *i.e.*, victims of sexual harassment may be entitled to unemployment compensation benefits depending on the circumstances, then Petitioner is obviously improperly requesting this Court to review the evidence. *See U.S. v. Johnson*, 286 U.S. 220, 227 (1925).

CONCLUSION

For the foregoing reasons, Petitioner has failed to demonstrate that a grant of certiorari is appropriate, and therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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